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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-419

PITTSBURGH PRESS COMPANY, Petitioner.

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC., Respondents.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Pittsburgh Commission on Human Relations is unreported but is set forth in the Appendix (Pet. App. 1-18).[1] The Court of Common Pleas of Allegheny County's opinion is also set forth in the Appendix (Pet. App. 19-45). The opinion of the Commonwealth Court of Pennsylvania (Pet. App. 46-79, A. 377) is reported at 4 Pa. Cmwlth 488, 287 A.2d 161 (1972). The per curiam opinion of the Supreme Court of Pennsylvania is set forth in the Appendix (Pet. App. 80).

1. "Pet. App." refers to appendix to the petition for certiorari. "A." refers to the separate appendix to the briefs.

Questions Presented.

JURISDICTION

The judgment of the Commonwealth Court of Pennsylvania was entered on January 27, 1972 (Pet. App. 46, A. 377). The decision of the Supreme Court of Pennsylvania denying the petition requesting allowance to appeal the Commonwealth's Court decision was entered on June 21, 1972 by per curiam opinion (Pet. App. 80). The petition for a writ of certiorari was filed on September 12, 1972, and was granted on December 4, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does it violate the First Amendment of the Constitution to apply the City of Pittsburgh Ordinance so as to prohibit a newspaper from arranging its help-wanted advertisements columns as "Jobs-Male Interest," "Jobs-Female Interest," and "Jobs-Male-Female"?

2. Is it a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution for a newspaper to be found in violation of the City of Pittsburgh Ordinance as aiding employer-advertisers to discriminate on the basis of sex when no evidence was produced to demonstrate that an advertiser discriminated against women in violation of the Ordinance?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Fourteenth Amendment of the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Human Relations Ordinance No. 75 of the City of Pittsburgh as amended by Ordinance No. 395 are as follows:

SECTION 8. UNLAWFUL EMPLOYMENT PRACTICES

* * * *

(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or

advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

* * * *

(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

* * * *

SECTION 20. UNLAWFUL EMPLOYMENT, HOUSING AND PUBLIC ACCOMMODATION PRACTICE BECAUSE OF SEX.

It shall be an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice for any person to discriminate against any other person in the manner set forth in Sections 8, 9, 10 and 11 of this Ordinance because of sex.

The Ordinance is set forth in full in the Appendix (Pet. App. 82-108, A. 410-436).

STATEMENT

The case arose on October 9, 1968 when the National Organization for Women, Inc. (N.O.W.) filed a complaint (A. 4) with the Pittsburgh Commission on Human Relations (Commission) charging the petitioner-appellant Pittsburgh Press Company (Press) with violations of Section 8(j) of Ordinance No. 75, as amended by Ordinance No. 395 of the City of Pittsburgh (A. 410). The Commission found, with one dissenting vote, that probable cause existed to file a complaint, and on November 3, 1969, a public hearing was directed. On January 15 and 16 and February 12 and 26, 1970, hearings were held before the Commission (A. 12).

At the hearings N.O.W. introduced witnesses who testified at length about the traditional roles of women in the job market and the discrimination allegedly practiced by employers in general against women. N.O.W. asserted that the Press was aiding this discrimination by employers and violating the ordinance in question by carrying its help-wanted advertisements in columns headed "Jobs-Female Interest", "Jobs-Male Interest" and "Jobs-Male-Female." No evidence was introduced to prove that a female was refused a job advertised under the heading "Male Interest" or that a male was refused a job advertised under the column heading of "Female Interest" in violation of the Ordinance. There was testimony by one woman indicating possible discrimination, but her testimony did not establish that either the job or the advertiser was covered by the Ordinance (A. 262).

In its pleadings and at the hearings before the Commission, the Press repeatedly contended that it was

denied due process in that it was accused of aiding in the commission of an unlawful act which was not alleged or proven (A. 8). The Press introduced testimony that the column headings it used were designed by it solely to maximize reader response by facilitating study of its columns by job seekers (A. 160-162), and that despite the additional expense incurred in utilizing these headings (A. 160, 163, 169), a policy decision had been made by the Press' Editor, Business Manager, and classified Ad Manager to use them (A. 170). Testimony was also introduced to show that the cultural and biological differences between men and women were reflected in general patterns of job preference by them (A. 187).

On July 23, 1970 the Commission issued its order (Pet. App. 1) providing that the Press must utilize a classification system of employment advertisements with no reference to sex. The Press appealed the order to the Court of Common Pleas of Allegheny County, Pennsylvania. The American Newspaper Publishers Association (ANPA) which had intervened in the Commission proceedings as amicus curiae, was permitted by the Common Pleas Court to intervene again as amicus curiae.

The Press and the ANPA argued that it was a denial of due process of law to find the Press guilty of aiding in any unlawful discriminatory employment practices against females when there was no proof of a single violation of the Ordinance by an advertiser of the Press. The Common Pleas Court found that it was not necessary to prove a specific act of discrimination in order to find that the Press was aiding in an unlawful employment practice. The general designation of sex in

the column heading was found to constitute "aiding" in discrimination under the statute without proof a specific discriminatory act by an advertiser (Pet. App. 36).

The Press also argued that it was a denial of its First Amendment rights to prohibit it from referring in any way to sex in its help-wanted classified advertisement column headings. The Common Pleas Court found that such a prohibition is not a denial of First Amendment rights inasmuch as the classified advertisement section of the Press was a commercial rather than editorial aspect of the newspaper (Pet. App. 43), and that the Commission's prohibition of the use of any reference to sex in column headings was justified solely on the basis that the general captions referring to male and female were offensive to the Ordinance (Pet. App. 35). By order dated March 24, 1971 the Court of Common Pleas of Allegheny County affirmed the order of the Commission solely on testimony given at the Commission hearings.

The Press appealed the decision of the Court of Common Pleas to the Commonwealth Court of Pennsylvania. The Commonwealth Court, in a sharply divided opinion, upheld the decisions and findings of the Commission and the Court of Common Pleas, concluding that the Press was not denied due process of law by having been found to be "aiding" in discrimination when no specific incident of discrimination in employment hiring by an advertiser had been shown. The Court reasoned that since the listing of the want ads under the sex designated column headings was per se discriminatory, there need not be a showing that any woman actually suffered any act of discrimination (Pet. App. 57, A. 388).

On the issue of denial of First Amendment rights, the Commonwealth Court held that advertising, per se, does not come within the purview of the First Amendment and that a prohibition from using sex designated want ad headings was conduct subject to regulation (Pet. App. 65, A. 396).

Two judges of the Commonwealth Court dissented, stating that it was a denial of due process of law to find the Press in violation of the ordinance as aiding an employer when no violation by such employer had been alleged or proven (Pet. App. 79, A. 408).

The Press petitioned the Supreme Court of Pennsylvania for allowance of appeal to review the decision and order of the Commonwealth Court. By per curiam opinion dated June 21, 1972, the Supreme Court of Pennsylvania denied the petition for allowance of appeal, with one justice of the opinion that the appeal should be allowed to review the First Amendment question presented (Pet. App. 80).

SUMMARY OF ARGUMENT

I

The newspaper's arrangement of help wanted advertisements by use of gender interest column headings is an activity within the protection of the First Amendment, for such arrangement falls outside the narrow concept of purely commercial advertising usually stated as the test for marking the end limit of First Amendment protection. The newspaper's right to arrange, emphasize, edit, or classify applies to its commercial aspects as well as its editorial and news operation.

Even if coupled with some aspects of a commercial transaction, the newspaper's right to arrange and publish classified advertisements under column headings reflecting a general dichotomy of interest is protected by the First Amendment. The extent of the First Amendment's protection to newspapers in the area of commercial advertising should be at least that afforded under the test of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The total exclusion by the Commonwealth Court of the commercial aspects of a newspaper from the protections of the First Amendment allows government a broad base from which to dictate the manner, emphasis and content of the newspaper's life blood.

The vitality of the press should not be sapped by interpretations of the First Amendment which would convert the business related operations of newspapers into the government's spearhead of social change.

Summary of Argument.

II

Due Process requires that there be a reasonable relationship between the evil recognized and the manner in which a governmental body attempts to eliminate that evil. The Pittsburgh Press was found to be aiding employers in denying equal employment opportunities to women by the use of gender designated column headings for employment listings. According to the decision of the Commonwealth Court of Pennsylvania, violation of the Ordinance by aiding in the committing of an unlawful employment practice was established merely by use of the column headings, without proof that any particular act of discrimination took place. The column headings were found to be discriminatory, and therefore per se violative of the Ordinance, because in the Commonwealth Court's opinion, they misstated the true interests of some females who may have an interest in jobs found under the male interest heading. The column headings were ordered eliminated by the Commonwealth Court because this supposed misstatement of female interests fell short of the societal ideal.

The fact that the classification used may fail to reflect the particular interests of some members of either sex tells nothing about the existence of aiding by the Pittsburgh Press in the committing of unlawful employment practices. The lack of a reasonable relationship between the use of gender interest column headings and the fact of an unlawful denial of employment opportunities to women make the standard used by the Commonwealth Court to find the Pittsburgh Press in violation of the Ordinance violative of the Due Process Clause.

ARGUMENT

I. Interpreting and Applying the Ordinance of the City of Pittsburgh to Prohibit a Newspaper From Arranging Its Help-Wanted Advertisements Under Columns Headed "Jobs-Male Interest", "Jobs-Female Interest" and "Jobs-Male-Female" Violates the First Amendment.

As formulated by the Editor, Business Manager, and Classified Ad Manager (A. 170) of the Pittsburgh Press the Press' help-wanted advertisement column headings were not intended to and do not in fact discriminate or indicate any discrimination against women. Rather, these headings reflect their view, and hence the newspaper's view, that both sexes will be benefited by being able to locate possible employment opportunities quickly and easily. The Commonwealth Court of Pennsylvania, while absolving the Press of any bad intentions and noting that the Press is "one of the nation's leading civil rights advocates in both word and deed" (Pet. App. 50, A. 381), concluded that this editorially established viewpoint as reflected in the column headings in question, was not protected by the First Amendment (Pet. App. 65, A. 396).

In so doing, the Commonwealth Court placed great weight (Pet. App. 59-61, A. 390-392) upon the official government opinion as set forth by the Pittsburgh Human Relations Commission and the City of Pittsburgh. This official opinion is that the Press' column headings are bad because they reflect outmoded social and economic positions of women and are in and of themselves a device to aid in the repression of the employment opportunities of women.

Argument.

Newspapers are a unique institution contemplated by the framers of the Constitution as being a major instrumentality of the interchange of views, information and opinions in a free society. The protection afforded them was great and not to be eroded by the abrasive winds of social change in the form of restrictive legislation regardless of how meritorious in concept.

The First Amendment's ban against "abridging the freedom of speech; or of the press" forbids the imposition by governmental authorities of socio-economic values so as to prohibit the Press from arranging its newspaper in a manner which it believes, in good faith best meets the needs of its readers. The particular arrangement here in question embodies a commentary on what types of employment may be of more interest to one sex than to another. The protection of the First Amendment is not restricted to commentary appearing in "editorials, or news columns or byline stories" (Pet. App. 66, A. 397). The column headings employed by the Press are no more than a short-hand formulation of the unanimous opinion of the newspaper's Editor, Business Manager, and Classified Ad Manager that there are numerous jobs of more interest to one sex than to another, and that this dichotomy of interest is so general that readers and advertisers are best served by the Press' system of classification which lists jobs under headings designated "Jobs-Male Interest", "Jobs-Female Interest", and "Jobs-Male-Female". If the arrangement of classified advertisements—maintained by the Press for the aforesaid reasons—can be prohibited, and under the logic of the decisions below it can be, the First Amendment's protections are devoid of any real substance beyond the editorial and news pages.

If the Press' arrangement of classified advertisements is not constitutionally protected, then the method in which any item appearing in any newspaper or other organ of the press is arranged, emphasized or edited becomes subject to governmental control merely because its arrangement, emphasis or impact is associated with a difference in treatment as to sex. Under the Commonwealth Court's interpretation of the Ordinance, the appearance of a classified job ad in "Ms" magazine would be unlawful since its placement in a periodical of predominantly female interest indicates an unlawful difference in treatment as to sex.

A. THE PITTSBURGH PRESS' COLUMN HEADINGS DO NOT FIT WITHIN THE DOCTRINE OF "PURELY COMMERCIAL ADVERTISING."

The Commonwealth Court, in failing to consider the possible infringement of First Amendment rights, was laboring under the false assumption that the doctrine of "purely commercial advertising" was applicable to the facts of this case. The court's confusion is understandable since the doctrine, which had its inception in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), has never been fully explained. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 414 (1970).

In *Valentine*, the validity of the Sanitary Code of New York, which prohibited distribution on the streets of "commercial and business advertising matter," was involved. Chrestensen was convicted for distributing a handbill advertising on one side the exhibition of a submarine for which an admission fee was charged and criticizing official public conduct on the other side. The Court upheld the regulation by placing commercial ad-

vertising outside the parameters of the First Amend ment, 316 U.S. at 54:

> We are equally clear that the Constitution im poses no such restraint on government as respect *purely commercial advertising*. Whether, and t what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activ ity shall be adjudged a derogation of the public right of the user, are matters for legislative judg ment. (Emphasis added.)

Valentine and subsequent cases interpreting its rationale are neither factually nor in principle appli cable to the Pittsburgh Press' help-wanted advertisemen column headings. The handbill in *Valentine* joined a commercial self-serving invitation to view a submarine with an admittedly protected political critique solely as a subterfuge to evade the ordinance. The Court's holding was based on its explicit recognition of Chres tensen's effort to evade the ordinance. *New York Time Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (dictum) Hence, the Court felt that it "need not indulge in nic appraisal based upon subtle distinctions in the presen instance nor assume possible cases not now presented." 316 U.S. at 55. The Court did not purport to pass on th situation here presented, where protected communica tion is legitimately joined with commercial advertising

Even if advertisers themselves may be subject t regulation under the *Valentine* doctrine, a newspaper' arrangement of advertisements is not thereby deprive of First Amendment protection. There has not bee any finding that the arrangement of the column head ings has been devised in an effort to protect the ads the Press is not trying to circumvent regulation of th

ads' content by connecting the headings to the want ads. Indeed the Commonwealth Court specifically noted that "[t]his is not a matter of whether the Pittsburgh Press intentionally conspired with some employer or employers to discriminate against women" (Pet. App. 61, A.392).

Given the editorial expression implicit is the Press' arrangement of classified advertisements, the meaning of the phrase "purely commercial advertising" becomes crucial. The history of the *Valentine* decision suggests it means advertisements or communication motivated solely by "personal profit." Brief for Petitioner at 16, *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

While focusing on the pure element of profit, the *Valentine* doctrine inherently recognizes the distinction between protecting ideas or opinions and the protection of products. *Developments in the Law: Deceptive Advertising,* 80 HARV. L. REV. 1005, 1030, 1038 (1967). *See also Associated Press v. United States,* 326 U.S. 1, 7 (1945). The distinction is valid since advertisements which misrepresent commercial products have no social value, whereas ideas and opinions — however fallacious — make a distinct contribution to society's ongoing quest for truth. Moreover, the false claims of product advertisements can often be empirically demonstrated, and therefore lend themselves to governmental regulation; but ideas and opinions are not susceptible to a preemptive empirical evaluation by the government. The latter is the essence of thought control and philosophical censorship and thus both dangerous and obnoxious in a democracy. *Cf. Deceptive Advertising, supra,* at 1030.

Argument.

The Press is here seeking only constitutional protection for its opinions and editorial functions embodied in its arrangement of column headings. Hence, a reversal of the decision below would have no effect on prior decisions upholding the constitutionality of statutory regulation of product advertising. *See e.g., Capital Broadcasting Co. v. Kleindienst,* 92 S.Ct. 1289 (1972), *aff'd mem.* 333 F. Supp. 582 (D.D.C. 1971); *Donaldson v. Read Magazine,* 333 U.S. 178 (1948).

B. The Pittsburgh Press Designation of Column Headings Is Constitutionally Protected Speech Even If It Is Coupled With "Commercial" Communications.

The apparent breadth of the *Valentine* "commercial" doctrine is questionable. "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano v. United States,* 358 U.S. 498, 514 (1959) (concurring opinion). The doctrine has been modified to require the application of normal First Amendment tests to determine the constitutionality of attempts to suppress ideas and opinions in a commercial context. *Cf. New York Times Co. v. Sullivan,* 376 U.S. 254, 265-266 (1964); *Smith v. California,* 361 U.S. 147, 150 (1959); *Bread v. City of Alexandria,* 341 U.S. 622, 642, 644 (1951).

As recently reaffirmed in *Branzburg v. Hayes,* 92 S. Ct. 2646 (1972), the test in considering the constitutional effect of a state statute on the press is to balance the individual and social interest in freedom of expression against the social interest sought by the restricting regulation. The Court also noted that the overwhelming weight of authority requires that the "State's interest must be 'compelling' or 'paramount' to justify

even an indirect burden on First Amendment rights." 92 S.Ct. at 2666. In holding that burden had been met, Justice White was careful to point out, 92 S.Ct. at 2656, what the case did not involve:

> We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But this case involves no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish,and no express or implied command that the press publish what it prefers to withhold.
>
> No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here.

These censorial threats to the freedom of the press are squarely presented here. Social commentary in the form of editorial judgment in the arrangement of classified advertising should not and cannot be prohibited on the speculative ground that some women might be psychically influenced by such comment. The Commonwealth Court, 4 Pa. Cmwlth at 463, 287 A.2d at 169, implies that it can and should be:

> The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. (Pet. App. 61, A. 392)

The Press believes in "legal sexual equality." The Press has established a policy of screening the content of its ads for any hint of discriminatory practice (A. 161-163). In each edition the Press has clearly and conspicuously stated its own nondiscriminatory purpose in using sex designated column headings.[2]

Yet, without any finding that the Press intended to discriminate against women or that there is no factual basis for its system of want ad classification, the Press's ability to voice its social commentary has been circumscribed. Paradoxically then in the area of equal employment opportunities between the sexes, the Press is now being subjected to a more stringent test than in the area of obscenity since material is not considered obscene if it has "even the slightest redeeming social importance."

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2. This notice appears prominently at the beginning of the want ad section (A. 382) and reads as follows:

> "Notice to job seekers. Jobs are arranged under male and female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex, unless sex is a bona fide occupational requirement. Unless the advertisement itself specified one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

The wording of this notice and its accompanying column headings follows the Guideline of the Equal Employment Opportunity Commission which was published in 30 Fed. Reg. 14928 (Dec. 2, 1965). The Commission has since amended its Guideline. *See* 37 Fed. Reg. 6835 (March 30, 1972).

Cf., Roth v. United States, 354 U.S. 476, 484 (1957). See also, Brennan, *The Supreme Court and Mieklejohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1, 7 (1965). The Press is effectively being required to prove empirically the truth of its opinion before it can be published. This is completely contrary to this Court's prior decisions; constitutional protection does not turn upon "the truth, popularity or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v. Button,* 371 U.S. 415, 445 (1963); *Near v. State of Minnesota,* 283 U.S. 697, 721 (1931).

We disagree with the interpretation of the limited extent of the protection afforded by the First Amendment to commercial aspects of publishing set forth in *United States v. Hunter,* 459 F. 2d 205 (4th Cir.), *cert. den.,* 93 Ct. 235 (1972). *Hunter's* holding that once an advertisement in a business context is involved, the government may regulate with impunity any facet of the operations of a newspaper, editorial or otherwise, associated with publishing that advertisement opens an area of unfettered governmental regulation far beyond the opinion's narrow discussion concerning the content of a particular ad. *Hunter's* complete exclusion from First Amendment protections of what it loosely terms commercial transactions allows government to force newspapers to act as the first line enforcement agencies in the policing of multifarious governmental regulations. Such a burden is obnoxious to the First Amendment. Cf. *Smith v. California,* 361 U.S. 147 (1959).

Moreover, the Court in *Hunter* formulated a rationale of newspaper culpability distinct from the basis of the Commonwealth Court's finding of a violation in

the present case. In *Hunter,* the Court coupled the sus
pect nature of a racial designation used in the body o
an ad with a test of inferred knowledge by the publishe
that the intent of the ad content was to communicate
discriminatory preference:

> A publisher can readily determine from the face o
> an advertisement whether it is intended to expres
> a discriminatory preference. However, the languag
> of the advertisement is couched, the purpose of a
> advertiser who wishes to publish an advertisemen
> in violation of this Act is to communicate his inten
> to discriminate and a newspaper publisher can di
> vine this intent as well as any of his readers. 45
> F. 2d at 213.

While we disagree with a standard which require
newspapers to "divine" the intent of its advertisers, w
submit that the Pittsburgh Press case presents a separ
ate question. In the present case it is the arrangement
chosen by the newspaper to display neutral advertise
ments, and not the content of the ad itself which bear
upon the First Amendment. The arrangement of adver
tisements is not comfortably within the ambit of com
mercial transactions as used in *Hunter,* supra, to de
scribe the limit of First Amendment protection. The
rationale of the Commonwealth Court's decision was no
premised upon the ads content, but rather upon the
newspaper's display of neutral ads by use of gende
designated column headings. The Commonwealth Court
made no finding that this arrangement aided in com
municating an unmistakable intent to communicate
discriminatory preference of the advertiser. Rather, the
Commonwealth Court found that the arrangement dis

played in the form of these column headings was sufficiently "out of line" with the ideals of society to rule its elimination:

> The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. (Pet. App. 61, A. 392)

Whatever may be the societal commitment, it can be used to dictate the manner in which we arrange our classified advertisements. We submit the power to dictate in what manner a newspaper arranges its advertisements could only overcome the First Amendment's right to a free and unfettered press when there is a showing of publication of advertisements in a manner which clearly communicates on its face an unmistakable intent to discriminate.

A test thus drawn is consistent with the decision in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Its rule prohibits a public official from recovering damages for a defamatory falsehood "unless he proves that the statement was with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. at 279. The rule here should afford at least as adequate protection for the arrangement of employment advertisements.

C. Social Change Cannot Be Effected at th Expense of Freedom of the Press.

The imperative of the existence of a free and u fettered press is as great today as it was when t First Amendment was adopted by the states. Today, never before since the Sedition Act of 1798, the pre feels its freedom is seriously threatened by a combin tion of judicial rulings and executive decisions. *Se* New York Times, January 1, 1973 at 5, col. 1. Wheth this threat is real or imaginary is immaterial if it h the effect of stifling the freedom of the press.

There are those who feel our system of freedom expression is a wholly inadequate instrument for deali with the urgent problems of the day. Moreover, o system is viewed as an instrument operating again social change and which may have to fall in the proce of change. T. Emerson, *The System of Freedom Expression* 725 (1970). This philosophy when adopt by the government is anathema to our concepts democracy and understanding of the First Amendme as has been recognized by members of this Court. *S Cohen v. California,* 403 U. S. 15, 27 (1971) (Justi Harlan); Brennan, *The Supreme Court and the Meik john Interpretation of the First Amendment,* 79 Ha L. Rev. 1, 15 (1965).

Affirming the decision below may seem to be a sm chip out of the First Amendment, but it would be other unalterable stroke in a chipping process that soon make the First Amendment unrecognizable. fact, a matrix of socioeconomic legislation has, as s in *Hunter* supra, and other cited cases, forceably c

scripted the press as a major, if unwilling, recruit in the fight to accomplish many statutory objectives. Newspapers are now tightly regulated in many aspects by many guidelines, regulations, and laws. They have even had an enforcement function thrust on them, are asked to "divine" intent of advertisers and in our case they are now told how they may arrange their advertising. This is an unreasonable abridgement of freedom of the press.

II. It Is a Denial of Due Process of Law Under the Fifth and Fourteenth Amendments to Find That a Newspaper Aided an Employer to Discriminate in Employment Solely by Arranging Help-Wanted Advertisements Under Sex-Designated Column Headings Without Proof That an Advertiser Discriminated in Violation of the Ordinance.

The Commonwealth Court found that the Pittsburgh Press aided employers to discriminate in employment in violation of Section 8(j) of the Ordinance as amended by arranging want-ads under male or female interest column headings. The court held that the column headings, without more, violated the Ordinance:

> If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific 'particular' or an actual discrimination suffered by any particular women. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination (footnote omitted) (Pet. App. 57, A. 388).

Thus, according to the Commonwealth Court: the prohibited aiding in the commission of an unlawful employment practice is committed by the mere use of column headings phrased "Jobs-Male Interest" and "Jobs-Female Interest"; no instance of a particular act of discriminatory practice by any employer-advertiser need be shown; the absence of knowledge by the Pittsburgh Press of any discriminatory practice by the employer-advertiser is irrelevant to the elements of the aiding violation; the fact that the content of the individual ads contain no reference to sex is of no significance, nor does the prominently displayed "Notice to Job Seekers" informing readers that they should assume any job equally available to either sex overcome the discrimination said to be inherent in the use of gender-interest column headings.

The Ordinance thus interpreted by the Commonwealth Court conclusively presumes the occurrence of invidious discrimination by employers and the aiding in such discrimination by the Pittsburgh Press. The Commonwealth Court arrived at this interpretation apparently on the basis of the assumption that the column headings used misstate the job interests of women:

> It is no longer possible to state that all women desire, or have an "interest" in, any one type or classification of work. Some women have the desire, ability and stamina to do any work than men can do. Once we accept such a premise it then becomes logically impossible to permit continued segregation of employment want-ads by column headings for any job coming within the purview of the Ordinance. (Pet. App. 59, A. 390, 391)

Argument.

The Commonwealth Court determination of the "per se" illegality of the use of gender interest column headings (even where accompanied by a prominent notice to readers to ensure understanding of the column arrangements) was thus founded upon that court's acceptance of the "premise" that the interests of "some women" may correspond to "any work that men can do." The Press does not dispute this underlying assertion. But the Press submits that such assertion in no way proves that the organization of want ads under its column headings is arbitrary, unreasonable, or invidiously discriminatory on its face. The Commonwealth Court's interpretation of the Ordinance, premised on a finding of per se illegality of "arbitrarily selected column headings" (Pet. App. 61, A. 392) has carried its prohibitions beyond the permissible bounds of the Due Process Clause, for the mere use of gender interest column headings does not have a real and substantial relationship to the existence of a denial of employment opportunity to women on account of sex.

The conclusive presumption of aiding in discrimination from the proof of the use of gender interest column headings is arbitrary, for there is no rational connection between the one fact proved (use of gender interest column headings) and the ultimate fact presumed (actual or indicated sex discrimination in employment practices). See *Tot v. United States,* 319 U.S. 463 (1943) *United States v. Romano,* 382 U.S. 136 (1965); *Griswold v. Connecticut,* 381 U.S. 479, 504 (1965) (concurring opinion).

The presence of the headings in conjunction with the "Notice to Job Seekers" signifies only that the jobs appearing under the female interest heading may be of

particular interest to women. The Commonwealth Court simply equates differentiation by sex on the basis of job interests with the invidious sex discrimination in employment practices prohibited by the Ordinance. This equation is unsound. The editorially established arrangement by "interest"—standing alone—does not establish or indicate a denial of employment opportunity based on sex. Gender interest column headings tell no more about the existence of the ultimate fact of invidious sex discrimination in employment practices than could be presumed if the newspaper published some want ads on the women's pages and others on the sports pages without any column headings. Equating differentiation by interest with invidious discrimination is tantamount to a determination that an employer may not lawfully place employment ads in particular magazines where they are more likely to be seen by women than by men.

The argument that the rationale for use of gender interest headings in employment can be equally applied to support race or national origin headings is inapposite to this case. We do not contend that employment opportunities are *generally* classifiable along racial or nationality lines. On the other hand, the Press believes that the employment patterns in this country *generally* reflect job interest and qualifications along sex lines. Most secretaries and nurses are women and most laborers and managers are men, and therefore it is not unreasonable to believe that most qualified applicants for a job advertised will be attracted from the men or the women presently filling such positions. These examples can be multiplied many times, with the result that a workable classification system arises from the existing de facto di-

vision of employment between males and females in numerous different types of work.

In adopting this workable classification system the Pittsburgh Press is only recognizing and reflecting existing employment patterns for the purpose and with the effect of assuring maximum reader exposure and response to employment advertisements. The possibility that the classifications used do not reflect accurately the inclinations or employment wishes of *all* members of each sex is certainly not such a shortcoming as to justify the conclusion that the newspaper's headings aid in discriminating against women.

CONCLUSION

FOR THE FOREGOING REASONS, it is respectfully submitted that the decision of the Commonwealth Court of Pennsylvania should be reversed.

Respectfully submitted,

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